

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

JESSICA VANGORDEN,

Plaintiff,

**3:11-cv-1044
(GLS)**

v.

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR THE PLAINTIFF:

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Gary L. Sharpe
Chief Judge

MEMORANDUM-DECISION AND ORDER

I. Introduction

Plaintiff Jessica VanGorden challenges the Commissioner of Social Security's denial of Disability Insurance Benefits (DIB) and Supplemental Security Income ("SSI"), seeking judicial review under 42 U.S.C. §§ 405(g) and 1383(c)(3). (See Compl., Dkt. No. 1.) After reviewing the administrative record and carefully considering VanGorden's arguments, the Commissioner's decision is reversed and remanded for further administrative proceedings.

II. Background

In September and October 2009, VanGorden filed applications for Child's Insurance Benefits (CIB) and SSI under the Social Security Act ("the Act"), alleging disability since October 1, 2008 and September 1, 2009, respectively. (See Tr.¹ at 49-50, 147-49, 154-57.) After her applications were denied, (see *id.* at 52-59), VanGorden requested a hearing before an Administrative Law Judge (ALJ), which was held on November 29, 2010, (see *id.* at 30-48, 62). On January 11, 2011, the ALJ issued an unfavorable decision denying the requested benefits, which

¹ Page references preceded by "Tr." are to the Administrative Transcript. (See Dkt. No. 9.)

became the Commissioner's final determination upon the Social Security Administration Appeals Council's denial of review. (See *id.* at 1-6, 13-29.)

VanGorden commenced the present action by filing her Complaint on September 1, 2011 wherein she sought review of the Commissioner's determination. (See *generally* Compl.) The Commissioner filed an answer and a certified copy of the administrative transcript. (See Dkt. Nos. 8, 9.) Each party, seeking judgment on the pleadings, filed a brief. (See Dkt. Nos. 13, 17.)

III. Contentions

VanGorden contends that the Commissioner's decision is tainted by legal error and is not supported by substantial evidence. (See Dkt. No. 13 at 3-5.) Specifically, she claims that the ALJ failed to properly assess her treating physician's opinion. (See *id.*) The Commissioner counters that the appropriate legal standards were used by the ALJ and his decision is also supported by substantial evidence. (See Dkt. No. 17 at 12-19.)

IV. Facts

The court adopts the parties' undisputed factual recitations. (See Dkt. No. 13 at 1-3; Dkt. No. 17 at 2-12.)

V. Standard of Review

The standard for reviewing the Commissioner's final decision under 42 U.S.C. § 405(g)² is well established and will not be repeated here. For a full discussion of the standard and the five-step process by which the Commissioner evaluates whether a claimant is disabled under the Act, the court refers the parties to its previous decision in *Christiana v. Comm'r of Soc. Sec. Admin.*, No. 1:05-CV-932, 2008 WL 759076, at *1-2 (N.D.N.Y. Mar. 19, 2008).

VI. Discussion

In her only argument, VanGorden asserts that the ALJ committed reversible error by failing to consider the opinion of treating psychiatrist Robert Webster, who co-signed a questionnaire completed by licensed clinical social worker Esther McGurrin. (See Dkt. No. 13 at 3-5.) The Commissioner counters that the ALJ considered the opinion and properly afforded it little weight. (See Dkt. No. 17 at 15-19.) The court agrees with VanGorden.

Medical opinions, regardless of the source, are evaluated by considering several factors outlined in 20 C.F.R. § 404.1527(c). Controlling

² Review under 42 U.S.C. §§ 405(g) and 1383(c)(3) is identical. As such, parallel citations to the Regulations governing SSI are omitted.

weight will be given to a treating physician's opinion that is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence." 20 C.F.R.

§ 404.1527(c)(2); see *Halloran v. Barnhart*, 362 F.3d 28, 32 (2d Cir. 2004).

Unless controlling weight is given to a treating source's opinion, the ALJ is required to consider the following factors in determining the weight assigned to a medical opinion: whether or not the source examined the claimant; the existence, length and nature of a treatment relationship; the frequency of examination; evidentiary support offered; consistency with the record as a whole; and specialization of the examiner. See 20 C.F.R.

§ 404.1527(c). Social Workers are not acceptable medical sources and thus, their opinions are not entitled to controlling weight. See *id.*

§ 404.1513(a), (d); SSR 06-03p, 2006 WL 2329939, at *2-3 (Aug. 9, 2006).

However, the opinions of social workers "should be evaluated on key issues such as impairment severity and functional effects, along with the other relevant evidence in the file." SSR 06-03p, 2006 WL 2329939, at *3.

Here, McGurrin, who began treating VanGorden in February 2010, completed a mental questionnaire and reported that, among other things, VanGorden had a marked limitation in her ability to "[c]omplete a normal

work day and work week without interruptions from psychological based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods” and an extreme limitation in her ability to “[r]espond appropriately to changes in the work setting.” (Tr. at 351-52, see *id.* at 317-22, 324-26, 337-38, 340, 342, 344.) Further, McGurrin opined that VanGorden’s symptoms and treatment would reasonably be expected to cause more than three absences from work per month. (See *id.* at 352.) Several weeks after McGurrin completed the questionnaire, Dr Robert Webster, who had examined VanGorden on several occasions, (see *id.* at 327-28, 339, 341, 343), co-signed the form. (See *id.* at 368-70.)³ The ALJ considered McGurrin’s opinion and, noting that she was not an acceptable medical source, afforded it little weight because it was “inconsistent with treatment notes where [VanGorden] was repeatedly counseled to look for work.” (*Id.* at 21.)

Although the ALJ cited to all of the medical records and specifically noted that VanGorden was evaluated by Dr. Webster, he failed to weigh Dr. Webster’s opinion as to Vangorden’s functional limitations. (See *id.* at

³ The record contains two copies of the form, one bearing McGurrin’s signature alone and one bearing Dr. Webster’s co-signature. (*Compare* Tr. at 351-53, *with* Tr. at 368-70.)

20-21, 368-70.) The Commissioner argues that the ALJ considered the questionnaire co-signed by Dr. Webster and determined that it only represented the opinion of McGurrin. (See Dkt. No. 17 at 16-17.)⁴ However, it is unclear from the ALJ's discussion of the questionnaire whether he considered the co-signature of Dr. Webster or that the opinion given was that of Dr. Webster as well as McGurrin. (See Tr. at 21.) The point is significant because of the consideration a treating physician's opinion is entitled to. See 20 C.F.R. § 404.1527(c)(2); see also *Payne v. Astrue*, Civil No. 3:10-cv-1565, 2011 WL 2471288, at *5 (D. Conn. June 21, 2011).

The Commissioner argues that, even if the questionnaire represented the opinion of Dr. Webster, substantial evidence supports the ALJ's decision to afford it little weight. (See Dkt. No. 17 at 17-18.) The court does not agree. Remand for further administrative proceedings is appropriate because the ALJ failed to explicitly consider and weigh Dr. Webster's opinion. See, e.g., *Burgin v. Astrue*, 348 F. App'x 646, 649 (2d Cir. 2009); *Rosa v. Callahan*, 168 F.3d 72, 82-83 (2d Cir. 1999); see also

⁴ The Commissioner does not dispute that Dr. Webster was VanGorden's treating physician. (See Dkt. No. 17 at 15-19.)

Treadwell v. Schweiker, 698 F.2d 137, 142 (2d Cir. 1983) (“the propriety of agency action must be evaluated on the basis of stated reasons”).

VII. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that the decision of the Commissioner is **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) for proceedings consistent with this Order; and it is further

ORDERED that the Clerk close this case and provide a copy of this Memorandum-Decision and Order to the parties.

February 1, 2013
Albany, New York


Gary L. Sharpe
Chief Judge
U.S. District Court